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VIA HAND DELIVERY

Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

Re: CC Docket No. 99-354

Dear Secretary Salas:

Enclosed please find an original and seven (7) copies of Global NAPs Inc.'s Reply for filing in the above-referenced docket.

If you have any questions concerning the attached document please contact the undersigned.

Respectfully submitted,

Brenda Boykin
Brenda J. Boykin

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cc: Attached Service List

Before the

Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Global NAPs, Inc. Petition for)	CC Docket No. 99-354
Preemption of Jurisdiction of the)	
Massachusetts Department of)	
Telecommunications and Energy)	
Pursuant to Section 252(e)(5) of the)	
Telecommunications Act of 1996)	

To: The Commission

REPLY OF GLOBAL NAPs, INC.

Global NAPs, Inc. (“Global NAPs”) submits this reply to the comments filed by the Commonwealth of Massachusetts Department of Telecommunications and Energy (“DTE”) and Bell Atlantic-Massachusetts, Inc. (“Bell Atlantic”). The DTE and Bell Atlantic incorrectly claim that the DTE has addressed the merits of Global NAPs’ complaint against Bell Atlantic, thereby rendering it moot. In fact, both by its own admission and under the Commission’s analysis in a related case, the DTE has not acted on Global NAPs’ complaint. Bell Atlantic also argues that the doctrine of claim preclusion applies because Global NAPs seeks to relitigate its complaint against Bell Atlantic in the case at hand. Global NAPs does not seek to *re*-litigate anything. Rather, it seeks a determination by the Commission that the DTE never addressed its complaint in the first place and that the DTE accordingly has failed to act under Section 252(e)(5).

ARGUMENT

The DTE and Bell Atlantic both claim that the DTE addressed the substance of Global NAPs’ complaint in its May, 1999 order in *MCI WorldCom v. Bell Atlantic*, DTE 97-116-C, and confirmed that action in its subsequent decision denying reconsideration of that order, DTE 97-

116-D.¹ These assertions are directly at odds with the plain language of the DTE's order in 97-116-C. As Global NAPs pointed out in its Application for Review, the DTE in 97-116-C acknowledged that Global NAPs had filed a complaint against Bell Atlantic but refused to address the specific circumstances of Global NAPs' agreement with Bell Atlantic. It also indicated that Global NAPs' complaint remained unresolved:

Unless *and until* some future investigation of a complaint, if one is filed, concerning the instant interconnection agreement determines a different basis for such payments, there presently is no Department order of continuing effect or validity in support of the proposition that such an obligation arises between MCI WorldCom and Bell Atlantic. Although MCI WorldCom and Bell Atlantic may still disagree about reciprocal compensation obligations under their interconnection agreement, there is – *post* February 26, 1999 – no valid and effective D.T.E. order still in place to resolve their dispute. Unsatisfying as it may be to say so, all that remains is a now-unresolved dispute.²

In a case involving the legality of Global NAPs' tariff for ISP traffic, the FCC discussed at length the fact that DTE 97-116-C did not resolve Global NAPs' complaint:

The Massachusetts DTE has yet to make a full and final determination whether the existing interconnection agreement between Bell Atlantic and MCI WorldCom – and by extension, other CLECs, including Global NAPs – provides for any intercarrier compensation for ISP-bound traffic. Not only did the Massachusetts DTE state repeatedly in its May 19, 1999 Order that this issue remains live and disputed, but the May 19, 1999 Order itself (from which 2 of the 5 Commissioners partially dissented) is the subject of several pending petitions for reconsideration. Moreover, *on April 14, 1999, Global NAPs filed with the Massachusetts DTE a complaint against Bell Atlantic regarding this very issue, and the Massachusetts DTE has not yet resolved Global NAPs' complaint.* Indeed, in its briefs here, Global NAPs acknowledges (albeit in passing) that the Massachusetts DTE still could decide that the existing interconnection agreement

¹ See *Opposition of the Commonwealth of Massachusetts Department of Telecommunications and Energy* (dated May 10, 2000) (“*DTE Opposition*”) at 7-9; *Opposition of Bell Atlantic to Application for Review* (dated May 10, 2000) (“*Bell Atlantic Opposition*”) at 1-2. Copies of DTE orders 97-116-C and 97-116-D are already in the record in this case.

² DTE 97-116-C at 25-26 (emphasis in original).

between the parties requires Bell Atlantic to compensate Global NAPs in some way for the delivery of ISP-bound traffic.³

In its initial comments in response to Global NAPs' preemption petition, the DTE also acknowledged that it had not yet adjudicated the issues raised by Global NAPs' complaint and stated that it would do so in the forthcoming 97-116-D order:

In its Petition for Preemption, GNAPs admits that its individual claims were "put on the shelf . . . by virtue of a meta-agreement: whatever the proper interpretation of the [GNAPs/Bell Atlantic] specific agreement, [Bell Atlantic] would pay [GNAPs] for ISP-bound calls if it paid other CLECs for ISP-bound calls under their other agreements." ***The terms of this so-called "meta-agreement" are being adjudicated in DTE 97-116-D.*** It is only after completion of DTE 97-116-D that the Department can determine whether GNAPs' individual dispute against Bell Atlantic has any validity. . . .⁴

Despite this buildup, DTE 97-116-D contained no analysis of the Global NAPs-Bell Atlantic agreement and abruptly announced that 97-116-C had somehow mooted Global NAPs' complaint. It thus contradicted the plain language of 97-116-C, the FCC's detailed analysis of 97-116-C and the DTE's own explanation of 97-116-C in comments in the case at hand.

This administrative bobbing and weaving clearly constitutes a failure to act. It also shows that despite the DTE's claim to the contrary, the Commission's analysis in *Petition of*

³ *Bell Atlantic-Delaware, Inc., et al. v. Global NAPs, Inc., Memorandum Opinion and Order*, File No. E-99-22 (released Dec. 2, 1999) ("*Tariff Order*") at ¶ 16 (emphasis added). In its opposition to Global NAPs' Application for Review, the DTE makes the specious claim that the Commission was referring in this portion of its *Tariff Order* to the question whether Global NAPs was due any form of intercarrier compensation *other than reciprocal compensation* for ISP-bound traffic and suggests that the Commission believed the DTE had resolved the question of reciprocal compensation. *DTE Opposition* at 7. The language highlighted above plainly shows that the Commission, like Global NAPs, was fully aware that 97-116-C did not address Global NAPs' complaint.

⁴ *Initial Comments of the Commonwealth of Massachusetts Department of Telecommunications and Energy*, CC Docket No. 99-354 (dated Jan. 6, 2000), at 8-9 (citations omitted) (emphasis added).

*MCI*⁵ is controlling here. According to the DTE, the FCC in *Petition of MCI* found that the Missouri Public Service Commission had not mooted MCI's preemption petition because the PSC addressed only price issues in the underlying arbitration dispute and left non-price issues outstanding. Global NAPs does not disagree. The DTE goes on to assert, however, that in contrast to the Missouri PSC, it has addressed "the question at the heart of GNAPs' complaint: whether Bell Atlantic was required to pay reciprocal compensation to GNAPs for termination of Internet Service Provider ("ISP")-bound calls."⁶ As noted above, this assertion flatly contradicts the plain language of 97-116-C, the FCC's reading of 97-116-C and the DTE's own initial comments in this proceeding. By its own admission, the DTE still has not addressed the question at the heart of Global NAPs' complaint.

The DTE's claim that it addressed Global NAPs' complaint in 97-116-C is a blatantly pretextual attempt to avoid Commission scrutiny of its failure to act. The Commission in *Petition of MCI* recognized that Section 252(e)(5) requires it to look behind a state's claim that it has mooted an interconnection dispute and to determine whether the state has, in fact, failed to act. Any other response by the FCC would eviscerate Section 252(e)(5) and would invite state commissions to follow the DTE's lead if they want to immunize themselves from preemption under Section 252. Like the DTE, they will feel free to release an order claiming to have mooted

⁵ *Petition of MCI for Preemption Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 12 FCC Rcd 15594 (1997) ("*Petition of MCI*").

⁶ *DTE Opposition* at 7.

CERTIFICATE OF SERVICE

I, Kathleen G. Maynard, hereby certify that on this 25th day of May 2000, I caused a copy of the foregoing Reply of Global NAPs, Inc. to be sent via Hand Delivery (*) or Federal Express to the following:

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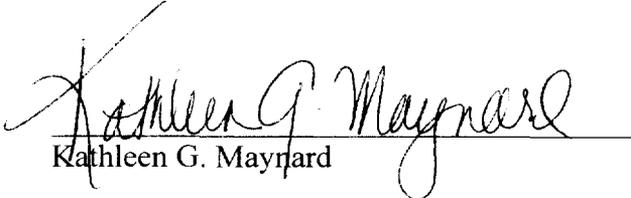
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the underlying dispute -- even if, like the DTE, they have said exactly the opposite in the recent past.⁷

Bell Atlantic also argues that Global NAPs' preemption petition is barred under the doctrine of claim preclusion because, according to Bell Atlantic, Global NAPs seeks to relitigate its complaint before the FCC.⁸ This argument is baseless. Far from attempting to relitigate its complaint, Global NAPs seeks a determination by the Commission that the DTE never addressed the complaint in the first place and that the DTE accordingly has failed to act under Section 252(e)(5). Courts and the Commission have long recognized that *res judicata* and collateral estoppel do not apply when there is no identity of claims or issues.⁹

Respectfully submitted,



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⁷ The DTE also argues that the Commission lacks authority to preempt in this proceeding because Global NAPs' complaint is not one of the types of proceedings specified in the Commission's interim preemption rules. *See DTE Opposition* at 4. Global NAPs addressed this argument in its Application for Review (*see* footnote 30) and in the Reply Comments it filed after its Petition for Preemption (*see* Reply Comments dated January 13, 2000 at 5-9). Rather than repeat those arguments here, Global NAPs directs the Commission to the relevant portions of its earlier filings.

⁸ *Bell Atlantic Opposition* at 4.

⁹ *See, e.g., Southeast Florida Cable, Inc. v. Martin County*, 173 F.3d 1332 (11th Cir. 1999); *Neufeld v. City of Baltimore*, 820 F. Supp. 963 (D. Md. 1993); *Montgomery County Media Network d/b/a/ Imagists, Memorandum Opinion and Order*, 4 FCC Rcd 3749 (Rev. Bd. 1989).